82-1268

Office-Supreme Court, U.S.
FILED
JAN 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October 1982 Term

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioner

v.

ROSCOE L. EGGER, JR., COMMISSIONER OF THE INTERNAL REVENUE SERVICE and THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS C. KARNOPP
ROBERT L. NASH
Johnson, Marceau, Karnopp & Petersen
835 NW Bond Street
Bend, OR 97701
Telephone: (503) 382-3011
Attorneys for Petitioner

QUESTIONS FOR REVIEW

1. Is the tribal government of a treaty Indian tribe exempt, as are all state and local governments, from federal excise taxes on diesel fuel, propane, truck parts and the use of highway trucks? The apparent intent of Congress was that governmental entities would not be subject to these excise taxes; however, the Internal Revenue Code provisions in question did not mention Indian tribes or tribal governments, thereby creating an ambiguity as to the intended tax treatment of tribes and tribal governments. Is plaintiff, a treaty tribe, implicitly included within the governmental entity exemption?

2. Plaintiff Tribes' principal economic asset is the timber located on the reservation, title to which is held in trust by the United States pursuant to the 1855 treaty. That treaty obligated the

United States to provide plaintiff Tribes with a sawmill, equipment, training and the other means necessary to make productive use of the timber. The diesel fuel, propane, truck parts, and truck highway use on which the IRS seeks to tax plaintiff Tribes were used in plaintiff Tribes' timber enterprise in connection with the harvest and sale of reservation timber. Is the imposition of these taxes in violation of the treaty and trust obligations assumed by the United States pursuant to the treaty?

3. Virtually all aspects of the growth, harvest and sale of tribal timber resources, including the allowable annual harvest, the setting of stumpage prices and disposition of the proceeds, are controlled and managed by the federal government pursuant to acts of Congress and pervasive regulations of the Department of the Interior, Bureau of Indian

Affairs. Is the imposition of excise taxes on the Tribes' means of production incompatible with this pervasive federal regulatory scheme, and beyond the authority delegated to the Internal Revenue Service?

4. After the decision of the lower courts in this case, Congress enacted the Indian Tribal Governmental Tax Status Act of 1982, Public Law 97-473. This Act resolved the pre-existing ambiguity by making it clear that the excise tax exemption for state and local governments includes tribal governments. While the Act is not by its terms retroactive, does it nevertheless demonstrate that the lower courts erred by failing to recognize that the excise taxes in question were never intended to be imposed on tribal governments?

TABLE OF CONTENTS AND AUTHORITIES

Questions Presented for Review 1

Opinions of the Courts and Agency Below. 4

Supreme Court Jurisdiction 6

Relevant Treaties, Statutes and Regulations 7

Statement of Facts.....13

Basis of Federal Court Jurisidiction....17

Reasons for Allowance of the Writ 18

Appendix
A-1 IRS Opinion
A-6 District Court Opinion
A-8 District Court Judgment
A-9 Ninth Circuit Opinion

AUTHORITIES

Cases

Donovan v. Navaho Forest Products Industries and Occupational Safety and Health Review Commission, 692 F2d 709 (10th Cir 1982). 26

Merrion v. Jicarilla Apache Tribe, ____ US ____, 102 S Ct 894, 71 LEd2d 21 (1982) 22

Santa Clara Pueblo v. Martinez, 436 US 49, 98 S Ct 1670, 56 LEd 2d 106 (1978) 22

Squire v. Capoeman, 351 US 1, 76 S Ct 611, 100 LEd 883 (1956). 25

United States v. Winans, 198 US 371, 49 LEd 1089 (1905) 21

White Mountain Apache Tribe v. Bracker, 448 US 136, 100 S Ct 2578, 65 LEd 2d 665 (1980) 23

Treaty

Treaty with the Tribes of Middle Oregon, June 25, 1855, ratified March 8, 1859, 12 Stat 963 . . . . 7, 8

Statutes

25 USC §406. 10
25 USC §407. 11
25 USC §413. 11
25 USC §466. 12
26 USC §4041 8
26 USC §4061 9
26 USC §4221 9
26 USC §4481 9
26 USC §4483 9
28 USC §1254 7
28 USC §1331(a). 18
28 USC §1346(a)(1) 18
28 USC §1362 17
28 USC §2101(c). 7

Indian Tribal Governmental Tax Status Act of 1982, Pub. Law 97-473 . . . . . 3, 12, 13, 20

Regulations

25 CFR Parts 141-142 12

OPINIONS OF THE COURTS AND AGENCY BELOW

By examination report and opinion dated October 31, 1978, the Internal Revenue Service assessed delinquent federal excise taxes against the Confederated Tribes in the sum of $52,904.55 for diesel fuel, propane, a truck chassis and the use of highway trucks, used by the Confederated Tribes in the tribal timber enterprise for tax periods from July 1, 1973, through December 31, 1977. The Confederated Tribes protested the assessment and filed refund claims totalling $8,592.50 for excise taxes which inadvertently had been paid. The IRS disallowed the protest and refund claim. The IRS opinion is printed in the Appendix, page A-1. The Confederated Tribes exhausted its administrative remedies through the IRS appellate division, and thereafter filed this action to set aside the delinquent excise tax assessment, and to obtain

a refund, on the grounds that the Confederated Tribes is exempt. The Tax Division of the Department of Justice, appearing on behalf of defendant Commissioner and the United States, sought judgment against the Confederated Tribes for the tax assessment plus interest from the date the taxes allegedly were incurred.

The Tax Division filed a motion for judgment on the pleadings, contending as a matter of law that the Confederated Tribes is not exempt. The Confederated Tribes filed a countermotion for summary judgment, with supporting affidavits from tribal officials and Bureau of Indian Affairs officials, seeking a determination that plaintiff is exempt.

The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, issued his opinion from the bench on July 17, 1981, denying the Confederated Tribes' motion for

summary judgment and granting defendants' motion for judgment on the pleadings. A transcript of the Honorable Judge Belloni's ruling is set forth in the Appendix. Judgment was entered in the District Court against plaintiff Tribes for unpaid excise taxes and interest, total $81,231.63, as of August 18, 1981, plus interest accruing thereafter. A true copy of the judgment is set out in the Appendix.

On October 29, 1982, the United States Court of Appeals for the Ninth Circuit issued its written opinion, published at 691 F2d 878, affirming the judgment of the District Court. A copy of the 9th Circuit opinion is printed in the Appendix.

SUPREME COURT JURISDICTION

The Ninth Circuit judgment to be reviewed was entered October 29, 1982, less than 90 days prior to the initial

filing of this petition. 28 USC §2101(c).

Jurisdiction is conferred on this Court by 28 USC §1254, which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ..."

RELEVANT TREATY, STATUTES AND REGULATIONS

Article 4, Treaty With the Tribes of Middle Oregon, June 25, 1855, ratified March 8, 1859, 12 Stat 963:

> "In addition to the considerations specified the United States agree to erect, at suitable points on the reservation, one sawmill and one flouring-mill; suitable hospital buildings; one schoolhouse; one blacksmith-shop with a tin and a gunsmith-shop thereto attached; one wagon and plough maker shop; and for one sawyer, one miller, one superintendent of farming operations, a farmer, a physician, a schoolteacher, a blacksmith, and a wagon and plough maker, a dwelling house and the requisite outbuildings for each; and to purchase and to keep in repair for the time specified for furnishing employees all necessary millfixtures, mechanic's tools, medicines and

hospital stores, books and stationery for schools, and furniture for employees.

"The United States further engage to secure and pay for the services and subsistence, for the term of 15 years, of one farmer, one blacksmith, and one wagon and plough maker; and for the term of 20 years, for one physician, one sawyer, one miller, one superintendent of farming operations, and one school teacher."

The excise taxes in question were assessed under the following sections of the Internal Revenue Code of 1954 (26 USC):

§4041(a) "Diesel Fuel.--There is hereby imposed a tax of 4¢ a gallon upon any liquid (other than any product taxable under §4081)--

(1) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle . . ."

. . .

"(g) Other Exemptions.--Under regulations prescribed by the Secretary, no tax shall be imposed under this section--...

(2) with respect to the sale of any liquid for the exclusive use of any State, any political subdivision of a State, or the District of Columbia, or with respect to the use by any of the foregoing of any liquid as a fuel . . ."

§4061(a) "Trucks, Buses, Tractors, etc.--

(1) Tax imposed.-There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10% of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5%--
automobile truck chassis
automobile truck bodies . . . ."

§4221(a)- "General Rule.--
Under regulations prescribed by the Secretary, no tax shall be imposed under this chapter (other than under §4121) on the sale by the manufacturer of an article--. . .

(4) To a State or local government for the exclusive use of a State or local government . . ."

§4481(a) "Imposition of Tax.-- A tax is hereby imposed on the use of any highway motor vehicle which (together with the semi-trailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicles) has a taxable gross weight of more than 26,000 pounds, at the rate of $3 per year for each 1,000 pounds of taxable gross weight or fraction thereof . . ."

§4483(a) "State and Local Government Exemption.-- Under regulations prescribed by the Secretary, no tax shall be imposed by §4481 on the use of any highway motor vehicle by any

state or any political subdivision of a state."

Federal control and management of tribal timber resources is provided by the following sections of Title 25, USC:

25 USC §406:

"(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under §413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a Treaty obligation or amount to a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his

heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

25 USC §407:

"The timber on unallotted lands of an Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to §413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct."

25 USC §413:

"The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the costs of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees or assignees, or deducted from the proceeds of sale, leases or other sources of revenue: Provided, that the amounts so collected shall be covered into the treasury as miscellaneous receipts, except when the expenses of the work are paid from

> Indian tribal funds, in which event they shall be credited to such funds."

25 USC §466:

> "The secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units, on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range and like purposes."

Comprehensive regulations have been adopted by the Department of Interior, Bureau of Indian Affairs, to implement the foregoing Congressional mandates. The regulations are found at 25 CFR Parts 141-142.

The Indian Tribal Governmental Tax Status Act of 1982, Public Law 97-473, was adopted and became effective after the decision of the Ninth Circuit in this

case. The relevant portions of the Act for this case are as follows:

> "§7871. INDIAN TRIBAL GOVERNMENTS TREATED AS STATES FOR CERTAIN PURPOSES.
> "(a) General Rule--An Indian tribal government shall be treated as a state--
> . . .
> (2) Subject to subsection (b), for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by--
> (A) chapter 31 (relating to tax on special fuels),
> (B) chapter 32 (relating to manufacturers excise taxes)
> . . .
> (D) Subchapter D of chapter 36 (relating to tax on use of certain highway vehicles)
> . . .
> "(b) ADDITIONAL REQUIREMENTS FOR EXCISE TAX EXEMPTIONS--
> Paragraph (2) of subsection (a) shall apply with respect to any transaction only if, in addition to any other requirement of this title applicable to similar transactions involving a State or political subdivision thereof, the transaction involves the exercise of an essential governmental function of the Indian tribal government."

STATEMENT OF FACTS

These facts, set forth in affidavits filed in the District Court in support of

plaintiff's summary judgment motion, were uncontradicted.

The Confederated Tribes, a recognized treaty Indian tribe, occupies the Warm Springs Indian Reservation in Central Oregon. The Tribes' principal asset and source of revenue to finance tribal government and governmental operations is the timber located on the reservation. The Tribes owns and operates a sawmill enterprise known as Warm Springs Forest Products Industries, to process the timber into lumber, plywood and chips, primarily for sale on commercial markets.

The United States government, through the Department of Interior, Bureau of Indian Affairs, controls virtually all aspects of the tribal forestry operations under a complex framework of federal statutes and regulations. The timber is grown, managed, harvested and sold, and the proceeds distributed, by and under the

direct supervision and control of the United States government. The United States, through the BIA, determines the allowable annual cut and the stumpage price, thereby determining both the quantity of tribal timber which may be cut each year and the price received by the Tribes for that timber.

In setting the stumpage prices, the United States government, through the BIA, appraises the value of the timber, taking into account the logging costs, milling and processing costs, local conditions, species and condition of timber, profit and risk factors, support costs such as fire control, slash disposal, etc., and the administrative and overhead costs for both the United States and the Tribes. The timber is sold at the price set by the BIA, and the BIA then deducts up to 10% of the stumpage receipts to reimburse the United States for its management costs,

under federal statutes and regulations providing for these deductions, with the balance payable to the Tribes.

None of the BIA's management plans, harvest plans or stumpage value calculations for Warm Springs have made any specific allowance for federal excise taxes which the defendants now seek to impose on the vehicles, equipment, fuels and highway truck useage of the tribal sawmill in processing and marketing the tribal timber.

Revenues from the timber enterprises usually make up about 85% of the Tribes' annual budget. These budgets are developed by the Tribal Council according to the needs of the people, subject to BIA review and approval. The tribal budget finances tribal government and governmental services, such as, public safety, tribal police, tribal court, roads, utilities, health, land use and develop-

ment planning, salaries for tribal employees, and all other governmental services.

The tribal sawmill operates under a plan of operation developed by the Tribal council and the BIA, and approved by the BIA. The sawmill's annual budget, covering operating expenses, working capital and capital improvements, is part of the Tribal Council's overall annual budget which is subject to BIA review and approval. Neither the sawmill's annual budget nor the Tribal Council's overall budget have specifically made any allowances for the imposition of federal excise taxes on the fuels, trucks, equipment and highway use of the tribal sawmill.

BASIS OF FEDERAL COURT JURISDICTION

Jurisdiction in the court of first instance was founded upon 28 USC §1362 because plaintiff is an Indian tribe with a governing body duly recognized by the

Secretary of the Interior, and the matter in controversy arose under the Constitution, laws or treaties of the United States.

Jurisdiction was also founded upon 28 USC §1346(a)(1) because this was an action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously or illegally assessed.

Federal question jurisdiction was also present under 28 USC §1331(a) because the action was against the United States and an officer thereof in his official capacity, and the matter in controversy arose under the Constitution, laws or treaties of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

1. The courts below decided an important question of federal law which has not been, but should be, settled by this Court.

There do not appear to be any reported federal court decisions which

address the questions presented for review in this case.

Numerous reported decisions address the liability of individual Indians for federal and state taxes; however, there is very limited precedent, judicial or legislative, on the tax status of Indian tribes and tribal governments.

There is no reason to believe that Congress intended to collect excise taxes from Indian tribes and tribal governments, with whom Congress has a special treaty and trust relationship, while at the same time Congress exempted all other governmental entities. The lower courts erroneously ruled that the Tribes is subject to the excise taxes because Indian tribes were not mentioned in the governmental entity exemption, the lower courts saw no other basis for an implied exemption, and felt that only Congress, not the courts, could address the issue.

The omission of any mention of Indian tribal governments in the excise tax exemption for governmental entities may have been an oversight, but it certainly is no indication that Congress intended to tax tribal governments while exempting all others. That oversight has been corrected by the enactment of the Indian Tribal Governmental Tax Status Act of 1982, which makes it clear that the exemption for governmental entities includes tribal governments. However, a justiciable controversy still exists because of the judgment for $81,231.63 plus interest against plaintiff Tribes for excise taxes assessed through December 31, 1977, and the likelihood that the Internal Revenue Service, based on the opinions of the courts below in this case, may impose further excise tax assessments against plaintiff Tribes and other tribes similarly situated for tax periods prior

to the effective date of the Indian Tribal Governmental Tax Status Act of 1982.

2. The decisions of the courts below contravene tribal sovereignty, treaty obligations, the intent of Congress and established fundamental principles of Indian Law.

The imposition of federal excise or other taxes on Indian tribes can only be viewed as an infringement upon and partial abrogation of tribal sovereignty. The treaty was a grant of rights and powers by the Tribes to the United States, and is to be interpreted as the Tribes understood it. The Tribes reserved all rights and powers of sovereignty which were not expressly given up in the treaty or subsequently abrogated by express act of Congress. United States v. Winans, 198 US 371, 380, 49, LEd 1089 (1905). Accordingly, it is a fundamental principle of federal Indian law, based upon a proper respect for tribal sovereignty and the plenary authority of Congress in this

area, that a congressional intent to abrogate or infringe upon tribal sovereignty cannot be implied, but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 US 49, 58, 98 S Ct 1670, 56 LEd2d 106 (1978); Merrion v. Jicarilla Apache Tribe, ___ US ___, 102 S Ct 894, 71 LEd2d 21 (1982).

Prior to the 1982 amendments, Indian tribes and tribal governments were not mentioned in the excise tax sections or elsewhere in the Internal Revenue Code. If Congress had intended to collect excise taxes from tribal governments, Congress would have said so. Congressional silence on the issue of taxation of Indian tribes, in the treaty, in the Internal Revenue Code and elsewhere, means that tribes, as sovereigns, are not subject to federal excise taxes until Congress expressly directs otherwise. The lower courts erroneously ruled that until Congress

speaks, tribes are taxable. The proper rule is that tribes are not taxable unless Congress speaks, clearly and unambiguously, to make them taxable.

Extraction of federal excise taxes on the Tribes' means of production used in the tribal timber enterprise violates treaty obligations and the federal regulatory scheme for the management and production of tribal timber resources. White Mountain Apache Tribe v. Bracker, 448 US 136, 100 S Ct 2578, 65 LEd2d 665 (1980) contains a comprehensive discussion by this Court of the special trust relationship between the United States and treaty tribes, the pervasive federal management and control of tribal timber resources, and the federal purpose in promoting tribal economic development and self-sufficiency through the harvest and marketing of tribal timber resources. That opinion held that state excise taxes

on motor fuels, motor carriers, etc., could not be applied to non-Indian logging companies operating on the White Mountain Apache Reservation, cutting and hauling timber to the tribal sawmill. While that case involved state excise taxes, the Court's reasoning is equally applicable to the imposition of federal excise taxes:

> ". . .The federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. . .There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. . .At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive... the benefit of whatever profit (the forest) is capable of yielding. . .' 25 CFR §141.3(a)(3)(1979). . . . Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the federal government. . . . The imposition of the taxes at issue would undermine that policy in a context in which the federal government has undertaken to regulate the most minute details of timber

> production and expressed a firm desire that the tribe should retain the benefits derived from the harvesting and sale of reservation timber. . . ." 65 LEd2d at 676.

As shown by the affidavits reprinted in the Appendix, neither plaintiff Tribes nor the BIA officials in charge of timber operations at the Warm Springs Agency have made any specific allowance for federal excise taxes in the budgeting and financial planning for the Warm Springs timber enterprise.

In Squire v. Capoeman, 351 US 1, 76 S Ct 611, 100 LEd 883 (1956), the government took the position that an individual Indian's income from the sale of timber grown on his restricted allotment was subject to federal capital gains tax because there was no express exemption in the Internal Revenue Code. This Court rejected that narrow, overly technical approach, and made clear that Indian tax exemptions may be found by implication

from sources outside the Revenue Code, because "...it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian." 351 US 8. It should never be presumed that Congress intended to tax the tribe itself, as distinguished from individual Indians, in the absence of a clear expression of Congressional intent. The lower courts gave insufficient recognition to this principle.

The decision of the Ninth Circuit is in conflict with a Tenth Circuit opinion, Donovan v. Navaho Forest Products Industries and Occupational Safety and Health Review Commission, 691 F2d 878 (1982), with respect to the applicable principles of tribal sovereignty and the clarity of Congressional intent which will be required before statutes of general application will be applied to Indian tribal governments. The Donovan case,

decided November 8, 1982, held that the Occupational Safety and Health Act of 1970 (OSHA) did not apply to Navaho Forest Products Industries, a Navaho tribal business enterprise on the Navaho reservation, an instrumentality of the tribal government. The basis for the holding was that there was no legislative intent in OSHA to abrogate the Navaho treaty by application of the Act to the Navaho tribe. The Tenth Circuit correctly recognized that application of OSHA to the Navaho tribal enterprise would dilute principles of tribal sovereignty and self-government recognized in the treaty, and refused to permit that result to occur absent a clear expression of Congressional intent.

From what source would the IRS collect the excise taxes? Would the IRS seize the diesel trucks, mill fixtures, and other tribal property used in the

timber operation, thereby disrupting or shutting down the federally managed timber operations? Or, would the IRS seize or garnish the proceeds of federally controlled timber sales, thereby confiscating funds which Congress has expressly directed to be paid by the United States to or for the benefit of the Tribes, subject only to such deductions for federal expenses as Congress has expressly authorized? By what clear, unambiguous Congressional authority has the Internal Revenue Service proceeded in this case?

Petitioner The Confederated Tribes respectfully requests the Court to grant the Writ.

DENNIS C. KARNOPP
ROBERT L. NASH
Johnson, Marceau,
Karnopp & Petersen

By: /s/ROBERT L. NASH
ROBERT L. NASH
Of Attorneys for Petitioner

IRS EXAMINATION REPORT AND OPINION:

SUMMARY OF DELINQUENT TAX LIABILITY
BY
CODE SECTION

(1) SECTION 4041(A) - DIESEL FUEL TAX
PERIOD - July 1, 1973 through
December 31, 1977

(a) Highway Diesel Powered
Vehicles (Chip Trucks)
Tax Rate 4¢
Proposed delinquent
liability $49,029.16

(b) Highway Diesel Powered
Vehicles (Water Trucks)
Tax Rate 4¢ - Licensed
Highway Type $534.00
Tax Rate 2¢ - Unlicensed
Highway Type $192.00

(2) SECTION 4041(B) - SPECIAL MOTOR FUEL
(PROPANE)
PERIOD - January 1, 1975 through
December 31, 1977
Tax Rate 2¢
Proposed delinquent
liability $2,484.78

(3) SECTION 4061(A) - MANUFACTURER
(TRUCK CHASSIS)
PERIOD - April 1, 1974 through
June 30, 1974
Proposed delinquent
liability $664.61

TOTAL PROPOSED DELINQUENT
LIABILITY $52,904.55

(4) SECTION 4481 - HIGHWAY USE TAX
CLAIM REJECTION IN FULL
MEMORANDUM AMOUNT CLAIMED ($8,593.50)

OTHER INFORMATION

FACTS:

The books and records of the above named taxpayer were examined pursuant to the Retailers Excise Tax imposed on Special Fuels by Section 4041(a) and (b), the Manufacturers Excise Tax imposed on Truck Chassis by Section 4061(a) and the Federal Use Tax imposed on Highway Motor Vehicles by Section 4481 of the Internal Revenue Code of 1954.

The principal cause of adjustment is the failure of the taxpayer to file the required Forms 720 for the periods shown in this report for the liability they have incurred on Special Fuels, Diesel and Propane, under Section 4041(a) and (b), and the Manufacturer Tax due on the fabrication of the truck from a Glider Kit as required by Section 4061(a). During the examination, the taxpayer also filed Claims for Refund on the Highway Use Tax

returns filed by them which are being disallowed in full as reflected in this report. The taxpayer is not in agreement with these findings and requests a District Conference.

Warm Springs Forest Products Industries located at Warm Springs, Oregon on the tribal lands of the Confederated Tribes of Warm Springs is an entity formed by the Tribal Council. The officers and members of the Warm Springs Forest Products Industries entity are appointed and approved by the Tribal Council and operate and conduct business on behalf of the Confederated Tribes of Warm Springs. This entity is not a corporation and it does not file Income Tax Returns.

In addition to the many business functions of this entity, Warm Springs Forest Products Industries, herein referred to as taxpayer, owns and operates licensed diesel powered highway motor

vehicles from the Tribal Lands to various points in the State of Oregon along public highways. These trucks by the virtue of their use on the public highways of Oregon are licensed highway trucks which are under the control and reporting to the Oregon Public Utilities Commission. These diesel powered highway trucks use diesel from bulk storage for which no tax has been paid or collected.

Located on the plant site is bulk diesel storage for which the federal excise tax has not been collected or authorized to be collected under Revenue Procedure 73-20. Taxpayer has two bulk tanks located on the reservation, one is used only to fuel the Highway Chip Trucks, as discussed above, and the other for all other trucks and is considered a non-highway bulk fuel tank.

Under the provisions of Section 4041(a)(2) the use of tax free diesel in

the tanks of a registered diesel powered highway motor vehicle is subject to tax at the rate of four (4) cents a gallon. Schedule 1, part 1(a) reflects the delinquent diesel fuel used for which the tax is due of $49,029.16. In addition to this use of fuel, there was the occasional use of fuel from the non-highway diesel tanks by both licensed and unlicensed diesel powered water trucks. This additional liability is reflected in part 1(b) of the same schedule and reflects a delinquent liability of $534 and $192 respectively for the licensed and unlicensed diesel water trucks.

The taxpayer has bulk storage for Special Motor Fuel, Propane, used in their propane propelled fork lifts. In the review of applicable invoices it was noted that 2¢ a gallon was charged on the bulk deliveries of propane to the taxpayer storage tanks. No authorization was

executed pursuant to Revenue Procedure 73-20 for the collection of any tax. To enable the taxpayer to maintain a consistent position in this examination and to avoid a possible overpayment of tax, it was suggested tax paid for the period from January 1, 1975 through December 31, 1977 be refunded from Williams Energy Company and that this tax be reflected in this examination. Accordingly the amount applied for and refund of $2,484.78 as reflected in Part 2 of Schedule 1, page 4 is restored to taxability. Under the provisions of Section 4041(b)(2) the use of tax free special motor fuel in the tank of a motor vehicle is subject to tax at the rate of 2¢ a gallon.

In May, 1974 the taxpayer acquired a Glider Kit Serial #103283 and completed the kit into a new truck chassis. The taxpayer failed to report the additional

manufacturers tax due on the fabrication of this taxable product as imposed under Section 4061(a). The method of computation of the delinquent manufacturers tax is reflected in Exhibit "A" of this report, in addition to the applicable court case and revenue ruling holding this to be a taxable occurrence. The delinquent manufacturer's tax of $664.61 is reflected in part (3) of Schedule 1, page 5 of this report.

In addition to the above noted inconsistency, the collection of tax on Special Motor Fuel, it was noted that the taxpayer filed forms 2290 on the use of Highway Trucks for the periods from 7503 through 7707. To enable the taxpayer to maintain a consistent position and to protect their interest pending the determination and applicability of excise taxes, it was suggested that they file claims on Highway Use Tax Forms 2290 filed

by them and subject to refund claims. These claims, six of them, were filed and received on May 12, 1978 by the District Director, Portland, Oregon. The claim was for a refund of $8,593.50 on the overpayment of Highway Use Tax for the period from April 1, 1975 through June 30, 1978. The claims were based on the following contention (in summary): (Refer to brief attached to claims)

TAXPAYER'S POSITION:

The taxpayer is not subject to Excise Taxes because they are implicitly exempt under the governmental exemption, Sec. 4483(a); ie a quasi-governmental body. Taxation of an Indian Tribe is contrary to Squire v. Capoeman and Revenue Ruling 67-284. Excise taxes cannot be imposed against an Indian tribe merely by implication from the absence of an express exemption in the Internal Revenue Code.

There is pending Federal Legislation, HR4089, which will recognize Indian Tribes are entitled to tax treatment at least as favorable as state and local government.

In addition to the brief attached to the claims, the taxpayer through their attorneys filed 2 briefs, one of December 22, 1977 and one of February 9, 1978 which further set forth their position that Confederated Tribes of Warm Springs Oregon is not subject to the imposition of any excise taxes. The taxpayer and their attorneys expressly request that these briefs be considered a part of the file and considered in the final determination of the applicability of excise tax.

Upon review of the applicable law and regulation, the facts as set forth in the Claim and two Briefs and as developed in the audit, it is accordingly recommended that the Claims be rejected in full.

LAW AND ARGUMENT:

The taxpayer has set forth various Supreme Court, Circuit Court and District Court and Revenue Rulings dealing with Income Tax Status and treatment of Indians. Research has disclosed that no "PARI MATERIA" exists between the concepts as set forth under Income Tax as having applicability to Excise Tax. To the contrary has been noted. If Congress had intended to give implicit excise exemption to Indian Tribes then HR4089 would not be necessary. Congress did give consideration to the excise tax treatments of Indians by the enactment of Sec. 4225, enacted 1/1/59 which affords an exemption for articles of native Indian handicraft. No other exemption has enacted to afford Indians any other relief. Revenue Ruling 58-610 addressed itself directly to the issue as set forth in this examination "An Indian Tribe or Council does not come

within the scope of the exemption from Manufacturers Excise Tax provided by Section 4224, currently 4221, of the Internal Revenue Code of 1954 with respect to sales made for the exclusive use of any State, Territory of the United States...."

Revenue Ruling 58-610 further states:

> "Section 4224, currently 4221, of the Code provides that no manufacturers excise tax shall be imposed upon the sale of any article for the exclusive use of any State, Territory or the United States, or any political subdivision of the foregoing, or the District of Columbia.
>
> An Indian tribe or council, although not a part of the United States Government, is under the supervision of the Bureau of Indian Affairs of the United States Department of Interior. Although a tribe is granted a certain allotment of land within a particular state as a site for its reservation, such a tribe is not a political subdivision or agency of a state. Accordingly, it is held that an Indian council or Indian tribe does not come within the scope of the exemption provided by Section 4224, currently 4221, pertaining to sales made for the exclusive use of a state or political subdivision thereof."

Revenue Ruling 72-334 held that a truck manufactured by an American Indian for use in his business is not exempt from the manufacturers tax on motor vehicles since it is not an "article of native Indian handicraft" within the meaning of Section 4225.

Revenue Ruling 72-335 held that an American Indian residing on a tribal reservation is liable for the highway use tax on the use of his truck in hauling logs on any public roadway inside or outside the Indian reservation.

CONCLUSION:

In light of the above citations, the review of the statutes, the regulations and applicable revenue ruling it is held that the taxpayer erred in failing to file required Forms 720 on the use of Special Fuels under Section 4041(a) and (b) and the Manufacturers excise tax imposed by

Section 4061(a) of the Code. The taxpayer further is liable for the Highway Use Tax Forms 2290 as filed and the claims have been rejected as noted above.

A copy of this report should be sent to the taxpayers attorney as requested on their filed Power of Attorney.

Send copy of this report to:

Owen M. Panner, Attorney
Robert L. Nash, Attorney
c/o Panner, Johnson, Marceau, Karnopp & Kennedy
1026 NW Bond Street
Bend, Oregon 97701

JULY 17, 1981 OPINION OF THE DISTRICT COURT, HON. ROBERT C. BELLONI:

THE COURT: Congress has the power to tax Indian tribes. It has done so. I can find no exemption, express nor implied. I can find nothing in the Treaty, a statute, in American Indian policy, nor in common sense to exclude tribes from this particular excise tax.

Congress has been specifically asked to create the exemption requested here. So far, it has not seen fit to do so. Congress has specifically exempted state and local governments. If it intended to exempt the tribes, it would have said so.

The charge or the use of a highway off the reservation by means of a tax on fuel obviously does not encroach upon The Tribe's sovereignty. In our system of government, the Legislative Branch legislates. It is not the function of the

Judiciary to create exemptions where Congress has not acted.

The broader question, going to my first statement and admission here that Congress has the power to tax Indian Tribes, if Congress, in exercising its power to tax Indian Tribes, is violating its treaty, then the total result here might be different. But this is a much broader proposition than the one claimed here, and it would have an extremely far-reaching effect. It hasn't been argued here, of course, and no serious contention is made that no such practice can be imposed. But I suppose the case law, in deciding that Congress has the power to tax tribes, has at least by implication and probably expressly, says that it does not violate its treaties.

The Defendant's motion for judgment on the pleadings is granted. Plaintiff's

counter-motion for summary judgment is denied.

I see no particular reason to write up anything on this. I have given my reasons sufficient for an Appellate Court to understand the basis, and to do anything else would simply take time that should be better utilized in efforts to have the Court of Appeals take a second look at it.

I don't think counsel needs to prepare anything. The Clerk will simply enter judgment.

(End of Proceedings)

Certified to be a true and accurate transcript of proceedings.

/s/ Joseph F. McCloskey
JOSEPH F. McCLOSKEY
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,	)	
Plaintiff,	)	Civil No. 80-6261-E
v.	)	JUDGMENT
JEROME KURTZ, COMMISSIONER OF THE INTERNAL REVENUE SERVICE and THE UNITED STATES OF AMERICA,	)	
Defendants.	)	

On the counterclaim by Defendant United States of America, against the plaintiff, judgment is hereby entered in the amount of $81,231.63. This judgment shall bear interest according to law from August 28, 1981.

Dated: 8-18-81

/s/ Robert C. Belloni
For the Court

Submitted by:
/s/ Bruce I. Crocker
BRUCE I. CROCKER
Trial Attorney
Tax Division
Department of Justice
Washington, DC 20530
Telephone: (202) 724-6421

THE CONFEDERATED TRIBES OF the WARM SPRINGS RESERVATION OF OREGON,
Plaintiff-Appellant,

v.

JEROME KURTZ, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, and THE UNITED STATES OF AMERICA,
Defendant-Appellees.

No. 81-3503.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Aug. 2, 1981.
Decided Oct. 29, 1982.

SNEED, Circuit Judge:

[1] The taxpayer, the Confederated Tribes of Warm Springs Reservation (the Tribe), instituted this action to recover federal excise taxes paid in connection with the operation of a tribal sawmill. The United States cross-claimed for additional excise taxes assessed but not paid. Motions for judgment on the pleadings and summary judgment followed. There exists no dispute with respect to the facts. The only issue is whether the Tribe is exempt

from the federal excise taxes involved here. The district court held that the Tribe is not exempt and entered judgment for the defendants and the United States on its cross-claim. We affirm.

I.

FACTS

The taxpayer is a confederation of Indian tribes which occupies the Warm Springs Indian Reservation in central Oregon. Timber located on the reservation is the Tribe's principal resource and principal source of revenue. Since 1967 the Tribe has owned and operated a sawmill to process and market reservation timber. The sawmill, located on the reservation, operates under the management of the Tribal Council and the Bureau of Indian Affairs.

Four separate federal excise taxes are at issue here: (1) a tax on the use of certain highway motor vehicles, 26

U.S.C. § 4481(a); (2) a tax on diesel fuel used in highway vehicles, 26 U.S.C. § 4041(a); (3) a tax on special fuels used in motor vehicles, 26 U.S.C. § 4041(b); and (4) a tax on manufacturing, in this case a truck chassis assembled by the Tribe, 26 U.S.C. §§4061(a), 4218(a). From April 1975 to June 1978, the Tribe timely paid all taxes due on its use of highway motor vehicles. In May of 1978, however, the Tribe filed for a refund, claiming an exemption from federal excise taxes. The Tribe's refund claim was disallowed and the Internal Revenue Service assessed additional excise taxes payable on the use of fuels and on the assembly of the truck chassis.

The Tribe does not deny that in its sawmill operations it has used the fuel and engaged in the activities with respect to which were assessed the disputed taxes. Rather, the Tribe asserts it is exempt

under provisions of the Internal Revenue Code of 1954 (the Code) that exempt states and political subdivisions of states from liability for the excise taxes involved here. See 26 U.S.C. §§ 4041(g)(2), 4221(a)(4), 4483(a). The Tribe argues alternatively that other federal statutes, as well as the Tribe's treaty with the United States, impliedly exempt it from these federal excise taxes.

II.

THE CODE PROVIDES NO EXEMPTION

Inasmuch as there is no dispute regarding the facts, our review of the district court's legal conclusions is de novo. First Charter Financial Corp. v. United States, 669 F.2d 1342, 1345 (9th Cir. 1982).

The Code exempts from liability for federal excise taxes "any State, any political subdivision of a State, or the District of Columbia." 26 U.S.C. §

4041(g)(2); see 26 U.S.C. §§ 4221(a)(4), (d)(4), 4482(c)(1), 4483(a). The Code and regulations pursuant thereto are silent with respect to Indian tribes. Nonetheless, the Tribe claims to fall within the exemption afforded state governments on the theory that the Tribe is recognized as a governmental entity by the United States.

And so it is in many respects. For example, it has been said that Indian tribes "'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'" Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1982) (quoting United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). Unlike state governments, however, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad

power of Congress." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980). This distinguishes Tribes from States. Tribal governments, while possessing aspects of self-rule, thus are quite distinct from the several states. Id. So in many respects is the District of Columbia. Congress, however, expressly exempted the District of Columbia from federal excise taxes. No similar exemption of Indian tribes exists. It follows that the state government exemption is not applicable to the Tribe merely because it is recognized as a governmental entity with the limited powers of a quasi-sovereign. A specific exemption remains necessary.

Also the Tribe is not a political subdivision of the State of Oregon; it derives no authority from the state. State authority with respect to

reservation Indians is limited both by the Tribe's right of self-government and the preemptive effect of federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. at 142, 100 S.Ct. at 2583. The state and the Tribe each functions within its proper sphere. Neither is a creature of the other. Only entities possessing at least some portion of the state's sovereign powers, or performing some portion of the state's traditional government functions, qualify for the federal excise tax exemption as political subdivisions of states. Washington State Dairy Products Commission v. United States, 685 F2d 298, 300 (9th Cir. 1982).

[2] Lacking an express exemption under the Code, the Tribe would have us find an ambiguity in the pertinent provisions of the Code merely because of its silence as to the taxability of tribal

governments.[1] It is true that ambiguous statutes and treaties are to be construed in favor of Indians, and this canon of statutory construction applies to tax exemptions. Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1367, 67

---

[1] As authority the Tribe cites a NLRB decision ruling that tribal governments are governmental entities and therefore are implicitly exempt from regulation under the Labor Management Relations Act because the Act exempts other types of governmental employers. Fort Apache Timber Co., 226 N.L.R.B. No. 63 (1976). The Board's ruling, however, is inapposite to the issue before us. Classifications made under the labor laws are not controlling in tax cases. Paseiro v. Commissioner, 46 T.C.M. (P-H) ¶77,359 (1977). Moreover, the Board explicitly declined to hold that the Tribal Council was the equivalent of a state. Rather, it merely ruled that the Tribe had sufficient governmental attributes to qualify under the Act's broad government exemption provision, a provision more inclusive than the excise tax exemptions before this court.

L.Ed.2d 347 (1981). But "wishing" an ambiguity does not make. Courts are not free to create ambiguities in order to serve the interests of Indians. Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed.2d 754 (1978).

[3, 4] Moreover, there are other interpretive maxims to which we must give weight. For example, absent clear statutory guidance, the court will not imply tax exemptions. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156, 93 S.Ct. 1267, 1274, 35 L.Ed.2d 144 (1973); United States v. Anderson, 625 F.2d at 916-17; Fry v. United States, 557 F.2d at 649. And also "'[t]he intent to exclude must be definitely expressed where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.'" United States v. Anderson, 625 F2d at 913 (quoting Choteau

v. Burnet, 283 U.S. 691, 696, 51 S.Ct. 598, 601, 75 L.Ed. 1353 (1931)).

[5, 6] We conclude that the Code and Treasury regulations pursuant thereto unambiguously restrict the benefit of the disputed exemption to states, political subdivisions of states, and the District of Columbia. The Tribe cites no legislative history to show that Congress intended other than the Code's plain meaning. Significantly, the Internal Revenue Service has ruled in three separate contexts that tribal governments are not treated as states for purposes of the Code: Gifts to tribal governments are not deductible as charitable contributions, Rev.Rul. 74-179, 1975-1 C.B. 279; interest on bonds issued by tribal governments is not tax exempt, Rev.Rul. 68-231, 1968-1 C.B. 48; and, for the issue presented here, tribal governments are not exempt from excise

taxes, Rev.Rul. 58-610, 1958-2 C.B. 815.[2] Moreover, both the House of Representatives and the Senate presently are considering bills that would expressly afford tribal governments the same treatment under specified tax laws as that afforded to states. S. 1298, 97th Cong., 1st Sess. (1981); H.R. 3760, 97th Cong., 1st Sess. (1981). These bills would provide tribal governments an express exemption from excise taxes. We are not prepared to assume that Congress is engaged in unnecessary work and, of

---

2 Revenue rulings, as opposed to regulations or Treasury Decisions, do not have the force of law. Washington State Dairy Prods. Comm'n v. United States, 685 F.2d 298, 300 (9th Cir. 1982). They may, however, be helpful in interpreting the law by indicating the trend of opinion among administrators experienced with the tax laws. Il.; see Udall v. Tallman, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965); Ricards v. United States, 652 F.2d 897, 902 n.12 (9th Cir. 1981).

course, it is not within our authority to relieve Congress of its burden.

III.

NO IMPLIED EXEMPTION

[7] The Tribe correctly points out that our inquiry is not limited simply to a determination of whether or not there is an exemption within the Code. Federal statutes and treaties dealing in particular with Indians have a direct bearing on Indian tax questions. Squire v. Capoeman, 351 U.S. 1, 5-6, 76 S.Ct. 611, 614-15, 100 L.Ed. 883 (1956); accord United States v. Anderson, 625 F.2d at 913. This court will imply a tax exemption from a statute or treaty that contains "express exemptive language." United States v. Anderson, 625 F.2d at 913; see, e.g., Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956) (construing sections 5 and 6 of The General Allotment Act of 1887 to create an

express tax exemption for an Indian deriving income directly from his own trust allotment).

A. Tribe's Treaty with the United States.

[8] The Tribe's treaty with the United States, however, is silent on the issue of federal taxation. Treaty of June 25, 1855, 12 Stat. 963. The Tribe's treaty with the United States, however, is silent on the issue of federal taxation. Treaty of June 25, 1855, 12 Stat. 963. The Tribe urges us to find an exemption within the treaty's silence. We cannot accede. Absent a "definitely expressed exemption," Indian tribes and their members are subject to federal taxation. Mescalero Apache Tribe v. Jones, 411 U.S. at 155, 93 S.Ct. at 1274. Silence alone does not create in favor of the Tribe an implied immunity from federal excise taxes.

B. Pervasive Federal Regulatory Scheme for Tribal Resources.

Turning to the federal regulatory scheme we acknowledge that the federal government's regulation of tribal timber resources is comprehensive. Timber on reservation land is owned by the United States for the benefit of the Tribe. See United States v. Mitchell, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). Timber may be sold only with the Secretary's consent, and proceeds from any such sale, less administrative expenses incurred by the federal government, are to be used for the benefit of the Indians or transferred to the Indian owner. 25 U.S.C. §§ 406-407. This regulation reflects a federal policy to manage the land resources of Indian reservations for the optimum economic benefit of the Indians. United States v. Anderson, 625 F.2d at 917.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court held that the pervasive federal regulatory scheme over tribal timber operations precluded the assessment of state excise taxes against two non-Indian logging companies solely operating on the Tribe's reservation. The Court identified a variety of ways in which the "state taxes would obstruct federal policies." Id. at 148-50, 100 S.Ct. at 2586-87. Federal law preempted Arizona's tax because the interests inherent in the federal government's comprehensive plan for the management of Indian lands and resources outweighed the state's interest in raising revenue. Id. at 150, 100 S.Ct. at 2587.

The Tribe contends that the federal taxes at issue here suffer the same infirmities that were fatal to Arizona's tax in White Mountain. Indeed, federal

and state excise taxes could impose similar economic burdens on tribal forestry operations. But, as the Tribes admit, White Mountain is not controlling precedent in the case before us. The Supreme Court's preemption analysis did not require an "express congressional statement" that the state tax was preempted. Id. at 151, 100 S.Ct. at 2587-88. In contrast, to imply an exemption from federal taxes in this case we must find "express exemptive language" in a statute or treaty. This is a wise requirement. To insist on such language reduces the risk of courts concluding that the left hand of the federal government is preventing the right form doing its job when in fact both are doing exactly what they should.

As evidence of "express exemptive language" the Tribe cites 25 U.S.C. § 413, and regulations promulgated pursuant

thereto. This section authorizes the Secretary "to collect reasonable fees to cover the cost of any and all work performed for Indian tribes." 25 U.S.C. § 413. The Secretary's regulations do not provide for federal excise taxes and the Tribe reasons that liability for excise taxes constitutes a charge not authorized by those regulations. This contention is without merit. Excise taxes are not charges for services. And section 413 is not a delegation by Congress to the Department of Interior of authority to tax Indian tribes. The lack of specific reference to excise taxes in the Secretary's regulations does not constitute "express exemptive language."

The government's supervisory role in tribal timber operations evidences a federal policy in favor of efficient land use on Indian reservations. The Tribe argues that federal excise taxes on its

sawmill operations obstruct this federal policy. But we have repeatedly held that such a policy alone does not create a federal tax exemption.

> [I]t is one thing to say that courts should construe treaties and statutes dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules.

Fry v. United States, 557 F.2d at 649. We deal here with an explicit federal Indian policy and an explicit federal tax statute that does not exempt the taxpayer. The Tribe must address its prayer for relief to Congress, not the courts.

AFFIRMED.

CERTIFICATE OF SERVICE

STATE OF OREGON)
) ss.
County of Deschutes)

I, ROBERT L. NASH, being first duly sworn, depose and say that I am one of the attorneys for Petitioner in this action.

I certify that I served the foregoing Petition for Writ of Certiorari on ROSCOE L. EGGER, JR., Commissioner of the Internal Revenue Service, and on the Solicitor General, Department of Justice, who are all of the parties required to be served, and that such parties were served by mailing to each of them three true, correct copies of the Petition for Writ of Certiorari, certified by me as such, contained in a sealed envelope, with first class postage prepaid, addressed to such parties at their regular post office addresses, to wit:

ROSCOE L. EGGER, JR.
Commissioner of the Internal
Revenue Service
United States Department of the
Treasury
1111 Constitution Avenue
Washington, D. C. 20224

Solicitor General
Department of Justice
Washington, D.C. 20530

and deposited in the United States post

office at Bend, Oregon, on January 27, 1983.

JOHNSON, MARCEAU,
KARNOPP & PETERSEN

/s/ Robert L. Nash
ROBERT L. NASH

SUBSCRIBED AND SWORN to before me this 27th day of January, 1983.

/s/ Rita Ann Graham
Notary Public for Oregon
My Commission Expires: 1/18/86

Office - Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1268

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, PETITIONER

v.

ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Cherokee Tobacco, The, 78 U.S. (11 Wall.) 616 3

Choate v. *Trapp*, 224 U.S. 665 5

Choteau v. *Burnet*, 283 U.S. 691 ..... 3, 5

Donovan v. *Navajo Forest Products Industries*, 692 F.2d 709 5-6

White Oklahoma Apache Tribe v. *Bracker*, 448 U.S. 136 6

Treaty and statutes:

Treaty with Indians in Middle Oregon, June 25, 1855, 12 Stat. 963 5

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 4041 ..... 1, 2
Section 4041(a) 3
Section 4041(b) 3
Section 4041(b)(2) 1
Section 4041(g) 2, 3
Section 4061 3
Section 4061(a) 2
Section 4061(a)(1) 1, 2
Section 4218(a) 2
Section 4221(a)(4) 2, 3
Section 4221(d)(4) 4
Section 4481 .....
Section 4481(a) 1, 2, 3
Section 4483(a) 2, 4

Page

Treaty and statutes—Continued:

Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 5

Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 4

Section 202(a), 96 Stat. 2608 4

Section 204, 96 Stat. 2611 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1268

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, PETITIONER

v.

ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below holding that it was not exempt, during the periods at issue, from federal excise taxes because of its status as a confederation of Indian tribes.

The pertinent facts may be summarized as follows: Petitioner is a confederation of Indian tribes occupying the Warm Springs Indian Reservation in Oregon and it owns and operates a sawmill situated on that reservation (Pet. App. A-19). In connection with the operation of that sawmill, petitioner owns and operates several "highway motor vehicles" as defined in Section 4481(a) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)), and uses "diesel fuel" within the meaning of Section 4041 of the Code. Petitioner also uses certain special motor fuels within the scope of Section 4041(b)(2). In addition, in 1974,

petitioner acquired a truck "glider" kit (cab, frame, and front axle), which it assembled into a truck chassis within the scope of Section 4061(a)(1) (Pet. App. A-19 to A-20).

After paying excise taxes with respect to the use of its "highway motor vehicles" pursuant to Section 4481(a) for several periods, petitioner sought to recover the amounts paid on the theory that it was exempt from federal excise taxes. Following the denial of its refund claim, petitioner instituted this suit for refund in the United States District Court for the District of Oregon.[1] In response, the government counterclaimed for additional federal excise taxes on the use of diesel fuel and special motor fuels under Section 4041 of the 1954 Code, and for manufacturer's excise tax under Sections 4061(a) and 4218(a) of the 1954 Code with respect to petitioner's assembly of the aforementioned truck chassis (Pet. App. A-20).

Petitioner claimed that it is exempt from liability for these excise taxes on the grounds (1) that it is a governmental entity within the scope of the exemption provisions of Sections 4041(g), 4221(a)(4) and 4483(a) of the 1954 Code, and (2) that no treaty provision expressly authorizes the imposition of these excise taxes. Petitioner also argued that the imposition of the taxes was inconsistent with the special relationship it has with the federal government, which ultimately manages its economic activities (Pet. App. A-20 to A-21). The district court granted summary judgment in favor of the government on the ground that no exemption, express or implied, exists to relieve petitioner of liability for these taxes (Pet. App. A-14 to A-16).

---

[1] In addition to seeking a refund of the taxes paid, petitioner's complaint sought injunctive relief restraining the government from assessing and collecting such taxes.

The court of appeals affirmed. It held that the pertinent provisions of the Internal Revenue Code unambiguously exempt only states, their political subdivisions, and the District of Columbia from the federal excise taxes at issue here, and that none of these provisions encompass Indian tribes. The court also held that no implied exemption existed under any treaty between the government and the tribes in question or because of any federal regulatory scheme regarding the exploitation of their resources (Pet. App. A-18 to A-35).

1. The decision below correctly held that petitioner was not exempt from federal excise taxes. It is well established that, absent an express exemption, a general federal taxing statute reaches all persons and entities within the scope of its terms, including Indians and Indian tribes. *E.g., Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931). See also *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).[2] It is undisputed that, by their terms, the taxing provisions of Sections 4041(a) and (b), 4061(a)(1), 4218(a) and 4481(a) of the Internal Revenue Code of 1954 apply to the activities in question. Moreover, no statutory exemption provision expressly encompasses the petitioner with respect to any of these activities.

An exemption from the diesel fuel and special motor fuels excise tax is provided by Section 4041(g) of the 1954 Code in the case of sales of such fuels to, or use by, "any State, any political subdivision of a State, or the District of Columbia." A similar exemption from the manufacturer's excise tax under Section 4061 is provided by Section 4221(a)(4)

---

[2]As the Court has indicated in numerous cases, Congress may, of course, prohibit the states from imposing such taxes.

with respect to articles that are sold to (and for the exclusive use of) a "State or local government." Section 4221(d)(4) defines the term "State or local government" for this purpose as meaning "any State, any political subdivision thereof, or the District of Columbia." Finally, Section 4483(a) exempts "any State or any political subdivision of a State" from the excise tax on the use of "highway motor vehicles." None of these provisions, however, encompasses Indian tribes by its terms. As the court below noted (Pet. App. A-22 to A-24), while such tribes may be characterized as "governmental entities" in certain respects, they simply do not fall within the terms of any of these exemption provisions since they are themselves neither "states" nor "political subdivisions" of any state.[3]

2. The court of appeals also correctly held (Pet. App. A-29) that an implied exemption does not exist by virtue of the fact that no treaty provision between the United States and the tribes in question expressly provides for the imposition of excise taxes on their activities. While it is true that ambiguities in a treaty are generally construed in favor of

---

[3]On January 14, 1983, the President signed into law the Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605. Section 202(a) of that Act (96 Stat. 2608) adds a new provision (Section 7871) to the Internal Revenue Code of 1954, under which Indian tribal governments are to be treated as states (and certain tribal subdivisions may be treated as political subdivisions of a state) for purposes, *inter alia*, of the excise tax exemption provisions here in issue. This provision, however, does not operate retroactively. Rather, under Section 204 of the Act (96 Stat. 2611), it became effective, for excise tax purposes, on January 1, 1983, and shall cease to apply, for such purposes, after December 31, 1984. Accordingly, the enactment of this provision does not aid petitioner with respect to the pre-1983 excise taxes at issue in this case.

Indian tribes or entities comparable to petitioner's, *e.g.*, *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), that rule is not relevant here. The treaty[4] between the government and petitioner contains no ambiguity regarding the taxation of petitioner, but is simply silent on this matter. Petitioner's assertion (Pet. 22-23) that the treaty's silence on the question of federal taxation serves to exempt petitioner from the taxes in question is diametrically opposed to the established rule that "[t]he intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." See *Choteau* v. *Burnet*, *supra*, 283 U.S. at 696.

Contrary to petitioner's further argument (Pet. 26-27), the decision below does not conflict with *Donovan* v. *Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). There, the court found a conflict between the Occupational Safety and Health Act of 1970 (OSHA), Pub. L. No. 91-596, 84 Stat. 1590, and a treaty between the government and the Navajo tribe. The Tenth Circuit, applying the general rule that ambiguities in Indian treaties are to be resolved in the favor of Indians, held that the application of OSHA to Navajo Forest Products Industries would abrogate a treaty provision which permitted, *inter alia*, the tribe to exclude all persons (except certain authorized government agents) from entering onto their land and which recognized the sovereignty of the Navajos and their right of self-government. In its view, requiring the Navajo Forest Products Industries to submit to inspection under and comply with OSHA would limit those rights. 692 F.2d at 711-712. Here, however, as the court of appeals determined, the treaty between the United States and petitioner granted

---

[4]Treaty with Indians in Middle Oregon, June 25, 1855, 12 Stat. 963.

petitioner no immunity from federal taxation. There is accordingly no conflict between the treaty and the excise tax provisions of the Internal Revenue Code.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

---

[5]Petitioner's reliance (Pet. 23-24) on *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), is similarly misplaced. There, the Court held that the federal regulatory scheme pertaining to the operation of a sawmill on the White Mountain Apache Reservation was so pervasive as to preclude the State of Arizona from imposing *its* excise taxes in connection with the operation of that business. However, nothing in that decision would suggest that the existence of a pervasive scheme of federal regulation would also preclude the federal government itself from imposing such "additional burdens" on the operation of a tribal enterprise. Nor is the principle of tribal sovereignty relevant here. Indian tribes retain a measure of their aboriginal independence vis-a-vis the states, but they are fully subject to the plenary power of Congress.

DOJ-1983-03